INTERLOCUTORY APPEAL BY CERTIFICATION OR PERMISSION

I. Certification Under Federal Rule of Civil Procedure 54(b).

"When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however, designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b).

A judgment certified under Rule 54(b) as final is immediately appealable. *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 442 (6th Cir. 2004).

Two independent requirements – final judgment and no just reason for delay.

Final Judgment. "It must be a 'judgment' in the sense that [there] is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)).

A decision that determines only liability, but not issues of relief, is not final and thus not certifiable under Rule 54(b). *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976); *Rudd Constr. Equip. Co. v. Home Ins. Co.*, 711 F.2d 54, 56 (6th Cir. 1983).

No Just Reason for Delay. This includes consideration of "whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980).

A "nonexhaustive list of factors" relevant to the determination of "no just reason for delay" includes "(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like."

Gen. Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022, 1030 (6th Cir. 1994) (quoting *Corrosioneering, Inc. v. Thyssen Envtl. Syst., Inc.*, 807 F.2d 1279, 1282 (6th Cir. 1986)).

District Court Certification. District court acts as a "dispatcher" to court of appeals by a Rule 54(b) certification. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980).

"[A] proper exercise of discretion under Rule 54(b) requires the district court to do more than just recite the 54(b) formula of 'no just reason for delay.'" *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 61 (6th Cir. 1986). In the absence of explanation, "any deference due the district court's Rule 54(b) order is nullified . . . ." *Id.* at 62; *see also Daleure v. Commonwealth of Kentucky*, 269 F.3d 540 (6th Cir. 2001) (holding that a formulaic recitation of 54(b) language was entitled to no deference).

"[I]n entering a Rule 54(b) certification, the district court should explain the factors warranting certification." *Knafel v. Pepsi Cola Bottlers of Akron, Inc.*, 850 F.2d 1155, 1159 (6th Cir. 1988).

In reviewing the district court's certification, the determination that an entire claim has been adjudicated is reviewed *de novo*, and the determination that there is no just reason for delay is reviewed for an abuse of discretion. *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1026 (6th Cir. 1994).

Court of appeals will dismiss an appeal if it determines the Rule 54(b) certification is improper. *Lowery v. Fed. Express Corp.*, 426 F.3d 817 (6th Cir. 2005) (claims were related and court placed undue reliance on settlement possibility).

If a proper Rule 54(b) certification is obtained after a notice of appeal has been filed, the premature notice of appeal "ripens." *Good v. Ohio Edison Co.*, 104 F.3d 93, 95 (6th Cir. 1997).

II. 28 U.S.C. § 1292(b) – Appeal by Permission

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 U.S.C. § 1292(b).

District Court Certification. The section "confer[s] on district courts first line discretion to allow interlocutory appeals." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995).

There must be a certification by the district court before a petition to appeal may be filed; a petition without certification will be denied. *Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 504 (6th Cir. 2011); *Lynch v. Johns-Manville Sales Corp.*, 701 F.2d 44 (6th Cir. 1983); *Wiltse v. Clarkson*, 542 F.2d 363 (6th Cir. 1976). (Federal Rule of Appellate Procedure 5 provides guidelines for filing a petition, but is not a separate grant of jurisdiction.)

When there is "extraordinary need" and district court has declined to issue a § 1292(b) certification, the court of appeals may proceed in mandamus. *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 471 (6th Cir. 2006); *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005).

Timely Petition. The ten-day period for filing the application cannot be extended by the district court or the court of appeals. *In re City of Memphis*, 293 F.3d 345, 348 (6th Cir. 2002); *Woods v. Baltimore & Ohio Railroad*, 441 F.2d 407 (6th Cir. 1971). The district court may, however, reconsider an interlocutory order and issue a certification. *In re City of Memphis*, 293 F.3d at 350.

Section 1292(b) does not apply in a criminal case. *In re April 1977 Grand Jury Subpoenas* 584 F.2d 1366, 1368 (6th Cir. 1978) (en banc), *cert. denied subnom*, *General Motors Corp. v. United States*, 440 U.S. 934 (1979).

Exceptional Case. Certification under § 1292(b) is reserved for the exceptional case, and is inappropriate where the trial proceedings will not be prolonged. *Cardwell v. Chesapeake & Ohio R.R. Co.*, 504 F.2d 444 (6th Cir. 1974); *Kraus v. Bd. of Cnty. Road Comm'rs for Kent Cnty.*, 364 F.2d 919 (6th Cir. 1966).

Question of Law. Review is limited to pure questions of law and not of disputed questions of fact. *Foster Wheeler Energy Corp. v. Metro. Knox Solid Waste Auth., Inc.*, 970 F.2d 199 (6th Cir. 1992).

Existence of factual issues resulted in dismissal of interlocutory appeal as improvidently granted. *Nguyen v. City of Cleveland*, 312 F.3d 243, 244 (6th Cir. 2002).

A legal question "generally does not include matters within the discretion of the trial court" such as a ruling on admissibility of evidence. *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002).

Controlling. If the "'resolution of the issue on appeal could materially affect the outcome of litigation in the district court,'" it may be considered a "controlling" question, *e.g.*, whether a bankruptcy court may conduct a jury trial. *In re Baker & Getty Fin. Servs., Inc.*, 954 F2d 1169, 1172 n.8 (6th Cir. 1992).

Scope of Appeal. A certification for appeal under § 1292(b) "applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court [and]. . . the appellate court may address any issue fairly included within the certified order . . . ." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996); *see also In re Trailer Source, Inc.*, 555 F.3d 231, 245 (6th Cir. 2009) (issues not certified may be reviewed if otherwise necessary to disposition of the case)(citing *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 912 (6th Cir. 1993)).

Examples. Whether an individual must be disabled to challenge a drug testing policy under the Americans with Disabilities Act. *Bates v. Dura Automotive Systems, Inc.*, 625 F.3d 283 (6th Cir. 2010).

Whether a creditor has derivative standing to bring action on behalf of a bankruptcy estate for avoidance of fraudulent or preferential transfers. *In re Trailer Source, Inc.*, 555 F.3d 231, 232 (6th Cir. 2009).

Whether the IRS properly valuated remaining lottery payments in calculating estate tax. *Negron v. United States*, 553 F.3d 1013 (6th Cir. 2009).

Whether claims against an ocean carrier for damages were subject to a statutory liability limitation. *Royal Ins. Co. of America v. Orient Overseas Container Line*, 525 F.3d 409, 412 (6th Cir. 2008).

Challenge to lethal injection protocol, statute of limitations, and *res judicata* argument. *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007).

Liability under Fair Debt Collections Practices Act. *Gionis v. Javitch, Block, Rathbone, LLP*, 238 F. App'x 24 (6th Cir. 2007).

Interpretation of mitigation doctrine in § 1983 action. *Grace v. City of Detroit*, 216 F. App'x 485 (6th Cir. 2007).

Whether a private right of action under 42 U.S.C. § 1983 exists for alleged Medicaid violations. *Wood v. Tompkins*, 33 F.3d 600, 602 (6th Cir. 1994).

III. Federal Rule of Civil Procedure 23(f) – Decisions Regarding Class Certification

"A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days. after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f).

This provision was added in 1998. The certiorari-like discretion of Rule 23(f) allows the appeals court to consider any relevant factor. *See* Advisory Committee Notes, 1998 Amendments. No district court certification is necessary.

Factors. There is no hard-and-fast test in support of immediate appeal, but rather a "broad discretion to grant or deny a Rule 23(f) petition," in which "any pertinent factor may be weighed . . . ." *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002). Interlocutory appeals are not routinely accepted under Rule 23(f). *Id.* at 959. A case may be especially appropriate for an interlocutory appeal if the certification decision has a "death-knell" effect: *i.e.*, if the grant of a plaintiff class propels the litigation into a high-stakes game such that the defendant is more likely to settle than litigate, or if the denial of a plaintiff class discourages the individual plaintiff from continuing due to the expense of litigation. *Id.* at 960. In such a case, the petitioner should also show some likelihood of success in overturning the class certification decision. *Id.*

Scope. "The question of subject matter jurisdiction is a prerequisite to class certification and is therefore properly raised in [a] Rule 23(f) appeal." *Olden v. Lafarge Corp.*, 383 F.3d 495, — (6th Cir. 2004).

Examples. Whether, in a Title VII case, a plaintiff class may be certified under Rule 23(b)(2) when the plaintiffs seek individual compensatory damages. *Reeb v. Ohio Dep't of Reh. and Corr.*, 435 F.3d 639 (6th Cir. 2006).

Whether Rule 23(b)(2) permits certification of a plaintiff class under the Equal Credit Opportunity Act. *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002).

Reviewing the denial of plaintiff class certification in antitrust action where district court held common issues or facts did not predominate. *Rodney v. Northwest Airlines, Inc.*, 146 F. App'x 783 (6th Cir. 2005).

IV. 28 U.S.C. § 1453(c)(1) – Class Action Fairness Act (CAFA)

"**(1) In general.** –Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeal may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order."

"**(2) Time period for judgment.**–If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3)." 28 U.S.C. § 1353(c)(1), (2).

Enacted in 2005, CAFA's provisions allow review of normally nonreviewable orders granting or denying a motion to remand an action to state court if the basis for removal was CAFA jurisdiction.

Procedural Issues. The statute provides a truncated period for deciding the appeal. Most circuits have held that the 60-day period begins to run only when the court of appeals has *granted* a petition to appeal. *Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 37 (1st Cir. 2009); *Morgan v. Gay*, 471 F.3d 469, 472 (3d Cir. 2006); *DiTolla v. Doral Dental IPA of New York*, 469 F.3d 271, 275 (2d Cir. 2006); *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 678 (7th Cir. 2006); *Evans v. Walter Indus. Inc.*, 449 F.3d 1159, 1162 (11th Cir. 2006); *Patterson v. Dean Morris, LLP*, 444 F.3d 365, 368-69 (5th Cir. 2006); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 685-86 (9th Cir. 2005); *Pritchett v. Office Depot*, 420 F.3d 1090, 1093 (10th Cir. 2005). In unpublished orders, this court appears to have followed these decisions.

Relevant factors. The Sixth Circuit has not addressed standards for accepting a CAFA appeal in a published decision. Some courts have mentioned the first-impression nature of an issue taken on appeal. *Estate of Pew v. Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008); *see also Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 809 n.1 (5th Cir. 2007); *Braud v. Transp. Serv. Co. of Ill.*, 445 F.3d 801, 802 (5th Cir. 2006).

Some circuits have offered factors and guidelines in considering such a petition. *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010); *BP America, Inc. v. Oklahoma ex rel.*

Edmondson, 613 F.3d 1029, 1034-35 (10th Cir. 2010). An assessment of the merits, the balance of harms, and the recurrence of the issue presented may all weigh into whether to grant such a petition.

A factor weighing into evaluation of such petition is the very expedited nature of the proceedings. *Alvarez v. Midland Credit Mgmt., Inc.*, 585 F.3d 890, 894 (5th Cir. 2009) (noting court "must weigh the time taken from earlier-filed appeals to tend to the CAFA appeal against the benefit of hearing such an appeal at this juncture").

Limits. Section 1453(c)(1) confers no jurisdiction to hear an appeal from a remand of an action that was removed on non-CAFA grounds. *In re UPS Supply Chain Solutions, Inc.*, 2008 WL 4767817 (6th Cir. 2008) (unpublished).

Examples. Since enactment of the statute in 2005, there have about 20 CAFA petitions to appeal, nearly all from orders that remand a removed action to the state court. (The statute also permits a petition from an order that denies a motion to remand.) Most of the petitions have been summarily disposed by order.

The court affirmed a determination that the $5 million amount in controversy necessary to remove under CAFA had not been met. *Smith v. Nationwide Prop. and Cas. Ins. Co.*, 505 F.3d 401 (6th Cir. 2007).

Because damages sought in consolidated suits should have been aggregated, remand to the state court was reversed for further consideration by the district court. *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008).

V. 28 U.S.C. § 158(d)(2) – Direct Appeal from Bankruptcy Court

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added provisions for the appeal of a bankruptcy court's decision directly to the court of appeals in certain circumstances.

The court of appeals has jurisdiction of a direct appeal from a decision of the bankruptcy court that would otherwise be filed in the district court under certain circumstances. If the bankruptcy court, the district court, or the bankruptcy appellate panel certifies, on its own motion, the request of a party, or if all of the appellants and appellees acting jointly, certify that —

> "(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> "(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> "(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceedings in which the appeal is taken;

"and if the court of appeals authorizes the direct appeal of the judgment, order, or decree." 28 U.S.C. § 158(d)(2).

Additionally, temporary procedural rules were enacted. Section 1233(b), Pub. L. 109-8, Title XII, 119 Stat. 203 (Apr. 20, 2005), directs the manner in which the appeal shall be taken. This includes a petition requesting permission to appeal that "shall . . . be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken[.]"

Requirements and Factors: Requires a notice of appeal to the district court or bankruptcy appellate panel; certification by either the lower court or all parties; a timely petition; and permission of the court of appeals.

Petitioner must appeal to the bankruptcy court and/or the bankruptcy appellate panel, obtain the necessary certification, and then petition for direct appeal to this court. *In re: Davis*, 512 F.3d 856 (6th Cir. 2008). Might be favored where the appeal would resolve a question of law not dependent on the facts of a particular case and/or might materially advance the litigation. *Id.*

A petition for direct appeal was granted to resolve a conflict among bankruptcy courts. *Deutsche Bank Nat'l Trust Co. v. Tucker*, 621 F.3d 460, 461 (6th Cir. 2010).

Examples: Determining the debtor's "projected disposable income" for purposes of Chapter 13 repayment of unsecured claims. *In re Darrohn*, 615 F.3d 470 (6th Cir. 2010).

Considering what is included in arrearages on an undersecured home mortgage. *Deutsche Bank Nat'l Trust v. Tucker*, 621 F.3d 460 (6th Cir. 2010).

Considering whether bankruptcy court could modify a secured claim on a mobile home. *In re Reinhardt*, 563 F.3d 558 (6th Cir. 2009).

PETITIONS TO APPEAL*

Year	Total	Type	Filed	Grant	Deny	Pending/Other
2011	37	1292(b)	14	1	5	8
		23(f)	12	6	2	4
		1453(c)	4	0	1	3
		158(d)	1	1	-	-
		Other**	6	0	5	1
2010	37	1292(b)	12	8	4	
		23(f)	18	11	7	
		1453(c)	2	0	2	
		158(d)	1	0	1	
		Other	4	0	4	
2009	35	1292(b)	6	3	3	
		23(f)	19	11	6	2 (withdrawn)
		1453(c)	6	5	1	
		158(d)	2	2		
		Other	2	2		
2008	37	1292(b)	11	10	1	
		23(f)	12	0	12	
		1453(c)	4	3	1	
		158(d)	3	2	1	
		Other	7	0	7	

* The information in this chart was obtained from the court of appeals docket entries for individual petitions to appeal that were filed during these four years. In 2007 and earlier years, it is not possible to derive the same information from the docket because the actual petitions and orders were not electronically entered. The total number of all petitions to appeal for earlier years is about the same: 2007 – 47; 2006 – 27; 2005 – 24; 2004 – 32; 2003 – 44; 2002 – 25; 2001 – 31.

** Includes "Rule 5" petitions lacking a jurisdictional basis and *pro se* petitions to appeal.